

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TOBY J. MASSE,

Plaintiff,

vs.

MAGGIE MILLER-STOUT, UNIT
SUPERVISOR BECERRA, JAMES
WATKINS, LARRY JENKINS, and
C/O STARR,

Defendants.

NO. CV-08-279-JPH

ORDER ADOPTING IN PART AND
STRIKING IN PART REPORT AND
RECOMMENDATION, DISMISSING
COMPLAINT IN PART, AND DIRECTING
SERVICE

*****ACTION REQUIRED*****

BEFORE THE COURT are Plaintiff's Objections (Ct. Rec. 9) to the Report and Recommendation to dismiss his complaint in part (Ct. Rec. 7). Plaintiff, a prisoner at the Stafford Creek Corrections Center is proceeding *pro se* and *in forma pauperis*; Defendants have not yet been served.

Plaintiff objects to the dismissal of the Department of Corrections. He concedes this Defendant is not a "person" under 42 U.S.C. § 1983, but seeks to bring supplemental state law claims of negligence and battery against this Defendant. As previously advised, the Ninth Circuit has held that the State of Washington did not waive its Eleventh Amendment immunity to suit in federal court by consenting
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1 to be sued in state court. *Whiteside v. Washington*, 534 F. Supp. 774,
2 778 (E.D. Wash. 1982) (*citing McConnell v. Critchlow*, 661 F.2d 116
3 (9th Cir. 1981) (*citing Skokomish Indian Tribe v. France*, 269 F.2d
4 555, 561 (9th Cir. 1959)). Consequently, Plaintiff may not pursue
5 pendent state claims against the State of Washington Department of
6 Corrections in federal court either. Therefore, **IT IS ORDERED** the
7 Report and Recommendation is **ADOPTED** regarding Defendant Department of
8 Corrections.

9 Plaintiff also objects to the dismissal of Grievance Program
10 Manager Schrum, claiming he failed to act to correct violations of
11 Plaintiff's constitutional rights. Once again, the failure of prison
12 officials to respond to or process a particular grievance does not
13 violate the Constitution. *See Flick v. Alba*, 932 F.2d 728, 729 (8th
14 Cir. 1991); *see also Baltoski v. Pretorius*, 291 F.Supp.2d 807, 811
15 (N.D.Ind.2003) ("[t]he right to petition the government for redress of
16 grievances, however, does not guarantee a favorable response, or
17 indeed any response, from state officials"). Therefore, **IT IS ORDERED**
18 the Report and Recommendation is **ADOPTED** regarding Defendant Schrum.

19 In addition Plaintiff objects to an unsupported finding he failed
20 to demonstrate a due process deprivation regarding his outgoing mail.
21 The court notes at page 3 of the Recommendation (Ct. Rec. 7), the
22 sentence beginning at line 3 and ending at line 5, "In addition . . ."
23 should be stricken to be consistent with the remainder of the
24 Recommendation indicating Plaintiff's claims of retaliation and
25 interference with his outgoing legal mail would be served.

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1 Therefore, **IT IS ORDERED** the Report and Recommendation is **ADOPTED**
2 **in part** and **STRICKEN in part**, the Complaint and the allegations
3 against the Department of Corrections and Defendant Devon Schrum are
4 **DISMISSED with prejudice**. The District Court Executive is **DIRECTED** to
5 **TERMINATE** these two Defendants from this action and to **STRIKE** them
6 from the caption of the complaint.

7 The court finds Plaintiff's remaining claims of retaliation and
8 interference with his outgoing legal mail are sufficient to require a
9 response from the remaining Defendants. **IT IS HEREBY ORDERED:**

10 1. The United States Marshal, in compliance with Fed. R. Civ. P.
11 4(c)(2) and (d), shall send, by First Class Mail, the Summons,
12 Complaint and this Order, upon the above-named Defendants, together
13 with a Notice of Lawsuit and Request for Waiver of Service of Summons,
14 two copies of the Waiver of Service of Summons and a return envelope,
15 postage prepaid, addressed to the sender. The costs of mailing shall
16 be advanced by the United States.

17 2. The District Court Executive shall mail a copy of the
18 Complaint to the Office of the Attorney General for the State of
19 Washington, Criminal Justice Division.

20 3. Defendants shall file an answer or otherwise respond to
21 Plaintiff's claims regarding retaliation and interference with his
22 outgoing legal mail contained in the Complaint within sixty (60) days
23 after mailing (if formal service is waived), forty-five (45) days if
24 service is not waived. Failure to so respond may result in entry of a
25 default judgment, pursuant to Local Rule 55.1. A Notice of Appearance
26 is not an adequate response.

